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No. 876

In the Supreme Court of the United States

OCTOBER TERM, 1969

JAMES CAMPIONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Statute Involved	2
Statement of the Case	4
Questions Presented	3
Reasons for Granting the Writ	10
Conclusion	17
Petitioner's Appendix	
A—Opinion	App. 1
B—Order Affirming	App. 10
C—Order Denying Petition for Rehearing	App. 11
D—Clerk's Certificate	App. 12

AUTHORITIES CITED

Cases

Cohen v. United States, 405 F.2d 34	15, 16
Dickerson v. United States, 413 F.2d 1111 at p. 1116	12, 16
Gouled v. United States, 255 U.S. 298	11
Lackey v. United States, No. 17310	12
Miranda v. United States, 384 U.S. 436	12

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To: The Honorable, The Chief Justice and Associate Justices of The Supreme Court of the United States:

Your petitioner, James Campione, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of conviction in the United States District Court for the Northern District of Illinois, Eastern Division, for wilfully attempting to defeat and evade income taxes and wilfully making and subscribing to United States Small Business Corporation Returns of income in violation of Title 26, United States Code, Sections 7201 and 7206(1).

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported. It is printed in the Appendix to this petition. (App. A, p. App. 1)

JURISDICTION

Judgment of the Court of Appeals was entered on September 17, 1969 (App. B, p. App. 10). A timely petition for rehearing was denied on October 24, 1969 (App. C, p. App. 11). The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

STATUTES INVOLVED

§ 7201. Attempt to evade or defeat tax

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

§ 7206. Fraud and false statements

> Any person who—
>
> (1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

QUESTIONS PRESENTED

1. Where the taxpayer's attorney was present during some of the meetings with the Special Agent of the Intelligence Division of the Internal Revenue Service, and the agent advised both the taxpayer and his attorney that he was not examining the taxpayer's returns but wanted information on third persons, and where on advice of his attorney, the taxpayer cooperated and gave testimony and records which also incriminated him, and after the agent determined that a fraud case would be opened on the taxpayer without advising the taxpayer or his attorney of any change in focus of the investigation, and without any warning as to taxpayer's Fifth Amendment rights, should not the Court have granted the motion to suppress the evidence which was turned over after criminal fraud in the affairs of the taxpayer became the target?

2. Is the securing of evidence from the taxpayer by a Special Agent of the Internal Revenue Service upon the representation that said agent is not interested in the taxpayer's return stealth or deceit prohibited by the Fourth Amendment to the United States Constitution and the rule in *Gouled* v. *United States*, 255 U.S. 298?

STATEMENT OF THE CASE

The petitioner was indicted on three counts of willful tax evasion (26 U.S.C. 7201) of personal income taxes for the years 1960, 1961 and 1962, and on two counts of willfully understating gross receipts of M. Campione & Son, Inc. on a Small Business Corporation Return of income (26 U.S.C. 7206(1)) for the years 1960 and 1962. The trial court, sitting without a jury, convicted the petitioner on all counts except for Count Two charging personal tax evasion for the year 1961.

The convictions were affirmed by the United States Court of Appeals for the Seventh Circuit.

The evidence upon which the conviction was had, viewed in the light most favorable to the Government, is set forth at pages 1, 2 and 3 of the opinion of that Court. However, a fuller exposition of the evidence seems appropriate.

M. Campione & Son, Inc., mason contractors, was founded by the petitioner's father, who died in August 1962. The petitioner then took over complete operation of the business. He filed Small Business Corporation Return of Income form as well as his personal tax returns for the years in suit. The amounts charged in the personal tax evasion counts are $5500 for 1960, $644.00 for 1961, and $77,000 for 1962. The amounts allegedly understated in the Small Business returns were $16,150.00 for 1960, and $90,000 for 1962.

Beginning in 1960, the Campione firm became a sub-contractor in the construction of the Sahara Motel, and purchased its materials from Edmier, a supplier of construction materials. The purchases were made in cash in order to gain discounts from the list price. Petitioner's father devised several means of getting cash for discount pur-

chases: cashing customer's checks and not running them through the business account, obtaining cash from customers, having customers' checks drawn to the order of Michael or James Campione instead of the firm and then using a bank account under a fictitious name. It was contended that these sums of money which were not run through the corporate books were used to purchase the raw material and that as a result there was no tax due as they were "wash" transactions.

In connection with the Internal Revenue investigation into the affairs of one Manny Skar and the Sahara Motel project, Special Agent Berwick, one of 20 to 25 Internal Revenue Service agents making inquiries into sub-contractors for the motel, first met with the petitioner on June 7, 1963. At that time Special Agent Berwick advised the petitioner that he was not interested in the petitioner's returns and was not examining his returns. At a subsequent meeting he also advised the petitioner's attorney, one Marshall Harris, a former employee of the Internal Revenue Service that he was examining Manny Skar and the Sahara North. There then ensued several meetings between the Special Agent and the petitioner, some of which were in the presence of the attorney, Harris. Finally, on July 24, 1963, also in the presence of the attorney, the petitioner told Berwick that Enterprise Erectors was a fictitious account and that the petitioner was in fact Sam Barlow. Agent Berwick had also indicated that he was inquiring into the affairs of sub-contractors, Sam Barlow and Enterprise Steel Erectors. The petitioner then explained that these names were used to get cash in order to obtain discounts on purchases from Edmier. It was as a result of this meeting that Special Agent Berwick determined that a fraud case was in the making on the petitioner. Agent Berwick caused the fraud case on Campione

to be formally assigned to him on August 8, 1963. At subsequent meetings, with his attorney present, petitioner made further incriminating statements, records were turned over to Special Agent Berwick on August 2, 1963, after the agent had concluded that a fraud case was indicated by the petitioner's statements to him. These statements were made under the continuing condition by Berwick that he, Berwick, was not interested in the tax returns or liability of the petitioner.

The pertinent portions of the record on this subject are as follows:

> "Q. At that time, you explained that you were not examining his tax returns, but you wanted to ask him some questions about his dealings with Manny Skar and the Sahara Motel?
>
> "A. Correct." (Tr. 609)
>
> "Q. Well, when did you tell him that he was the subject of an investigation?
>
> "A. I don't think I ever told him he was the subject of investigation." (Testimony of Agent Berwick Tr. 613)

Later however Agent Berwick testified that he notified the Petitioner and attorney Harris about the criminal fraud case in June 1964, one year after Berwick's initial contact with Petitioner.

The determination that Petitioner would be the subject of a criminal investigation was made in July 1963. At Tr. 634, the trial court, in an *in camera* examination of certain official reports stated:

> "The Court: One exhibit says that Campione was first contacted in June of '63 as a witness in the Manny Skar investigation; that he conferred with Campione in the office of his attorney on July 24th and July 26th in connection with the Manny Skar investigation.

"I think we have a date here. I will let you have this. James Campione was not officially notified of an examination of tax returns, but the examination started based on statements he made in the presence of his attorney on July 24th and July 26th, 1963."

It is Petitioner's contention that his attorney Harris was also misled by Berwick and the record reveals that Harris was present on some occasions when Berwick received information.

"Q. What positions did you hold with Internal Revenue Service?

"A. With the Internal Revenue Service, I was Internal Revenue Agent. I was a member of the appellate staff. I also was in public relations and training, giving talks on income tax, doing radio and television work.

"In addition, I spent a period of approximately six or eight months as a training officer, teaching new agents to apply the income tax laws.

"Q. Now, do you know James Campione?

"A. Yes, I do.

"Q. How long have you known him?

"A. I have known Mr. Campione since some time in 1963.

"Q. Now, were you present at a time when Mr. Berwick came in to see Mr. Campione at any time?

"A. I have been present at certain meetings that Mr. Berwick had with Mr. Campione. Not the initial meeting, however.

"The Court: You are talking about the July meeting. You weren't there at the June meeting?

"The Witness: That is correct, your Honor.

"The Court: All right.

"By The Witness:

"A. (Continuing) There was a June meeting; I was there. But the initial June meeting, I was not present.

"By Mr. Calihan:

"Q. Now, very briefly, did you ever hear from Mr. Berwick that the affairs of Mr. James Campione and his wife or Mr. Campione & Sons were not under direct investigation?

"A. Were not under?

"Q. Yes.

"A. Yes, I did.

"Q. When was the first time that you heard that; when was this?

"A. At the initial outset of his examination, he told us that he was examining Mammy Skar and the Sahara North and related matters, and had nothing to do with Mr. Campione.

"The Court: Was this in June or July?

"The Witness: In June and July.

"The Court: All right.

"By Mr. Calihan:

"Q. Now, when was the first time you were advised by Mr. Berwick that James Campione and his wife were under investigation and Mr. Campione & Son were under investigation?

"A. I was never so advised.

"Q. All right. Did you continue after June or July of 1963 to furnish information and documents to Mr. Berwick?

"A. Yes, I did." (Tr. 1088-1091)

On the basis of the foregoing, a motion to suppress evidence was made in the trial court. After the parties rested at the trial, the District Court denied the Petitioner's motion to suppress as evidence the incriminating statements made in 1963 and the records turned over to Berwick, on the ground that the Petitioner's attorney was with him when he made the incriminating statements and turned over the incriminating records. The basis of the affirmance in the Court of Appeals and the Government's contention below is to be found in what they consider to be an awareness by attorney Harris that a case might be opened.

The government and the Court of Appeals relied upon the following testimony of Special Agent Berwick to show that neither Harris nor the petitioner were misled.

> "In other words, you started out by telling him you were not examining his returns, you were interested in the Sahara.
>
> "A. Right.
>
> "Q. And you just left it that way from that time on?
>
> "A. No, I believe, oh, in July or so, when he signed an affidavit for me—
>
> "Q. Of what year?
>
> "A. Of 1963. Now, this is from memory. Mr. Harris told me that if an investigation was opened up that I should contact him, that he was representing Mr. Campione.
>
> "Q. And did you contact him?
>
> "A. Right, I served a subpoena on him. If I can refresh my memory, I think I have a copy of it there and also a letter. (Tr. 613-14)

The subpoena and letter were served in March or April of 1964 after Berwick had concluded his fraud investigation.

It was petitioner's contention below that the casual remark of his lawyer that if an investigation was opened up, the agent should contact him, in no way constituted any acknowledgement that a criminal case was in the making. It was urged that the only reasonable interpretation of this statement by Harris was that should the petitioner's civil liability be raised at some future time, that the agent should contact him. In any event, this remark by Mr. Harris could not constitute an awareness in the petitioner that he was continuing to cooperate at his peril.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question which has not been but should be decided by this Court. It is whether or not Internal Revenue Agents have an affirmative duty to inform a taxpayer that he is the subject of a criminal investigation if at any point along a collateral inquiry into the liability of other taxpayers this becomes apparent in his investigation.

2. There now exists a conflict between the Seventh Circuit Court of Appeals and other Circuits on the question of this duty.

I.

This case presents a difficult question. Here, the taxpayer was approached by a Special Agent of the Intelligence Division of the Internal Revenue Service, who, together with another twenty or twenty-five agents, were engaged in the investigation of a financial fiasco involving the construction of a motel known as Sahara North. The agent initially contacted the taxpayer and advised him that he was not interested in the taxpayer's returns but that he was assigned to inquire of certain of the sub-contractors' details of financial transactions involved in the construction of the Sahara Motel by its operator, one Manny Skar, deceased. The taxpayer, on that representation, did commence cooperation as requested by Special Agent Berwick. The taxpayer's attorney, one Marshall Harris, a former employee of the Internal Revenue Service, was also advised that the Special Agent was not interested in the taxpayer's returns. On the basis of these representations and on advice of that attorney, continuing cooperation was had from the taxpayer.

At one point the Special Agent advised the taxpayer that he was also interested in two other sub-contractors, one Sam Barlow, and the other, Enterprise Steel Erectors, Inc. The taxpayer thereupon advised the agent that both of these sub-contractors were fictitious accounts which were used by him in order to secure sums of money which were used to pay Edmier, a construction material supplier, cash in return for discounts on the materials which were used in the construction of the Sahara North. As a result of this information secured in the latter part of July, July 23rd and July 24th, to be exact, Special Agent Berwick determined that a criminal fraud case should be developed on the taxpayer. However, Special Agent Berwick did not so inform the taxpayer or his attorney. He continued to secure their cooperation on the same basis as was originally stated, namely, that he was not interested in the taxpayer's returns. Special Agent Berwick did not have the formal assignment of the taxpayer made to him until August 8, 1963. However, the Revenue Agent's report which was examined in camera by the Court indicated that he came to the determination that criminal fraud was appropriate as a result of his conversations with the taxpayer on July 23 and July 24, 1963. Notwithstanding this determination, he secured vital evidence and records of Enterprise Steel Erectors from the taxpayer on August 2, 1963.

It was the contention below that at least the evidence secured on August 2, 1963, should have been suppressed. As a general proposition, however, it is also contended that all evidence secured as a result of the circumstances under which any information was given should have been suppressed. This case presents a situation in which the rule of *Gouled* v. *United States,* 255 U.S. 298, should apply.

Any tesitmony or evidence secured upon the representation that the taxpayer's return was not involved, was secured by a form of deceit. This manner of securing evidence cannot be "voluntarily" because the circumstances are not known. But it raises also, other problems. At the time the case was tried, it was generally held that *Miranda* v. *United States,* 384 U.S. 436, did not apply except to a custodial type of interrogation. It did not really involve *Escobedo* (378 U.S. 478) in one sense because an attorney was present during many of the interviews. However, after the case was argued before the United States Court of Appeals for the Seventh Circuit, that Circuit came down with two decisions, one *Lackey* v. *United States,* No. 17310 and the other, *Dickerson* v. *United States* (413 F2 1111). As a result of the *Dickerson* case, the Seventh Circuit has held prospectively that Agents are required to give the *Miranda* warning in any circumstances where it becomes evident that criminal prosecution may ensue. This case was not argued on the basis of *Miranda* or *Escobedo,* but was argued on the question of misrepresentation or deceit.

The Court of Appeals below, however, found that there was no deceit because Harris, the attorney for the petitioner, said to the Special Agent at some time not exactly pinpointed, that if an investigation did open up on the Special Agent to continue in his initial representation that he was not interested in the taxpayer's returns or his tax liability and yet knowing full well that he would use anything further he acquired from the taxpayer or his attorney after he had come to his conclusion in July of 1963.

Another important question is presented by this case. If the petitioner assumes that despite not having specifically raised *Miranda* below, he is entitled to raise it before

this Court, what is the effect of a fact situation where two of the four criteria laid down in *Miranda* are present, but two are missing?

More specifically, the rule in *Miranda* requires that when the investigatory process has focused upon the individual, he must be advised of four things: He must be advised of his right to silence; he must be advised that if he does give a statement that his statement can and will be used against him in Court; he also must be advised of his right to counsel; and that he has a right to appointed counsel if indigent.

In the case at bar, he had counsel. Therefore, he need not be advised of his right to counsel nor that he has a right to have counsel appointed if he is indigent. However, does he still, despite the fact that he has an attorney, have a right to be advised of his right to silence and the possible use of any statement? Thoughtless avarice would dictate that remark, an avariciousness in which the petitioner obviously did not approve or concur in. The Court of Appeals has regarded this as some sort of awareness by the attorney that it was possible that the petitioner might be involved in criminal fraud proceedings and that, therefore, all of the statements and evidence which petitioner made were done so with an awareness that he could be involving himself in a criminal tax evasion case. The defense argued below and argues here that the fact that a case might be opened up against the petitioner did not mean anything other than his civil liability might come into question. Or more likely, that a civil audit might later ensue. If anything this remark by Harris clearly indicates that he too was not aware that Berwick was contemplating criminal action.

The real problem presented here is, aside from all the speculations, the Special Agent, once he had come to the determination in July of 1963 that the petitioner was go-

ing to be the subject of a criminal fraud investigation, have an affirmative duty to sit down with both the taxpayer and his attorney and say to them, "I must now advise you that despite what you have told me heretofore, anything you tell me from now on, you tell me at the peril of its being used against you and that you have an absolute right from this point on not to say anything further or give me any additional evidence." This is not a frivilous position if the record shows the attorney is also misled. It seems to the petitioner that if Special Agent Berwick, despite the fact that attorney Harris was present, even made these two simple statements to the taxpayer and/or his attorney, that he had a right at some point, to remain silent and that "from now on any statement that you make may and will be used against you" that it would constitute notice not only to the defendant but to his attorney that the focus had shifted from the Sahara North and Manny Skar to the taxpayer. Petitioner recognizes what has occurred here is somewhat of a hybrid situation. The petitioner's position is one which partakes of both the Fourth and the Fifth Amendments to the Constitution of the United States. It involves the Fourth Amendment to the extent that information and evidence secured was secured by means of a form of misrepresentation or deceit. It also relates to the Fifth Amendment so far as any possible application of *Miranda* is concerned. When the two are tied together, the importance of any warning that the taxpayer has a right to remain silent and that if he does give a statement that statement can be used against him, would and should have been an appropriate warning or alarm bell not necessarily to the taxpayer, but certainly to his attorney that there had been some change in position or change in the attitude under which Special Agent Berwick had been obtaining his "cooperation" with the taxpayer.

And so this case also tends to bring forth yet another problem which it is respectfully suggested ought to invite this Court's grant of certiorari. That question is whether, despite the fact that a taxpayer may have a lawyer, does the presence of his attorney represent some sort of guarantee that he is fully advised. Is it a shield against any effective contention that despite his presence, the taxpayer was misled into giving information which incriminated him?

The real issue is whether or not the taxpayer "voluntarily" gave the information. It can reasonably be assumed from all of the evidence, that while the lawyer should have known better, he, along with the taxpayer, and the taxpayer reliant on his advice, embarked upon a course of cooperation which was bottomed on the premise that the Special Agent was not interested in petitioner's returns. The decision in this cause represents a viewpoint that lawyers, being trained, should recognize Revenue Agents as charlatans, and that sophisticated knowledge is attributed to his client. Only thus can the decision stand. This is a premise we do not credit. Instead, the question here is, having embarked upon a premise that the Special Agent was not interested in the taxpayer's liability, what duty did he have, once he came to the determination, that a criminal fraud case should be opened. Simply stated, did he have an affirmative duty to advise or inform the taxpayer that he was *now* the subject of a criminal investigation.

II.

The petitioner respectfully submits to this Court that in the light of many decisions on this subject, there now exists a conflict in the Circuits. In *Cohen* v. *United States*, 405

F.2d 34, the Court of Appeals for the Eighth Circuit reviewed the subject of *Escobedo* and *Miranda* warnings and then stated:

> "While there is district court authority for the view that Internal Revenue Service agents have an affirmative duty to inform a taxpayer that he is the subject of a criminal investigation in circumstances comparable to those here, the United States Courts of Appeals have uniformly held to the contrary."

In footnotes the Eighth Circuit then reviews holdings in the First, Second, Fourth, Fifth, Sixth, Seventh and Ninth Circuits.[1] However, this decision of the Eighth Circuit was written on December 18, 1968. So far as the Seventh Circuit is concerned, that Court, in *Dickerson* v. *United States*, 413 F.2d 1111 (July 28, 1969) now holds contrary to the Eighth Circuit as well as the others mentioned. The Court stated at p. 1116 as follows:

> "Our conclusion is that Miranda warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the intelligence division. We have reached this conclusion on the basis of our examination of the circumstances surrounding criminal tax investigations generally, and we find that the objective circumstances of such confrontations with government authority warrant the above warnings without regard to the individual taxpayer's subjective state of mind."

This case was decided after argument in the case at bar and was given a prospective application by the Court of

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[1] These cases differ from the case at bar in that they involve the transition from a "routine" civil audit to a fraud case. In the case at bar there was a collateral inquiry.

Appeals for the Seventh Circuit. But that case involved only a failure to warn where the taxpayer was on notice that *his* return was under examination. This case involves deception and deceit and his attorney afforded no insulation against that.

CONCLUSION

Wherefore, for the above and foregoing reasons, petitioner respectfully prays this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this cause.

Respectfully submitted,

EDWARD J. CALIHAN
Attorney for Petitioner

APPENDIX

APPENDIX A

In The

UNITED STATES COURT OF APPEALS
For The Seventh Circuit

No. 17177 SEPTEMBER TERM, 1968 APRIL SESSION, 1969

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES CAMPIONE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

September 17, 1969

Before KILEY and FAIRCHILD, *Circuit Judges,* and MORGAN, *District Judge.**

KILEY, *Circuit Judge.* Defendant was indicted on three counts of willful tax evasion[1] of personal income taxes for the years 1960, 1961 and 1962, and of two counts of willfully understating gross receipts of M. Campione & Son, Inc., on the Small Business Corporation Return of Income[2] for the years 1960 and 1962. The district court,

* Judge Morgan is sitting by designation from the United States District Court for the Southern District of Illinois.

[1] 26 U.S.C. § 7201.

[2] 26 U.S.C. § 7206(1).

without a jury, convicted defendant on all counts except for Count II charging personal tax evasion for the year 1961. Defendant has appealed. We affirm.

M. Campione & Son, Inc., mason contractors, was founded by defendant's father, who died in August, 1962. Defendant then took over complete operation of the business. He filed Small Business Corporation Return of Income forms,[3] as well as his personal tax returns for the years in suit. The amounts charged in the personal tax evasion counts are $5,500 for 1960, $644 for 1961, and $77,000 for 1962. The amounts allegedly understated in the small business returns are $16,150 for 1960 and $90,000 for 1962.

Beginning in 1960 the Campione firm was a subcontractor in the construction of the Sahara Motel, and purchased its materials from Edmier, a supplier of construction materials. The purchases were made in cash in order to gain discounts from the list price. Defendant's father devised several means of getting cash for the discount purchases: cashing customers' checks and not reporting them, obtaining cash from customers, or having customers' checks drawn to the order of Michael or James Campione instead of the firm, and using a bank account under a fictitious name.

In connection with IRS investigation into the affairs of the late Manny Skar and his Sahara Motel project, agent Berwick, one of the agents making inquiries into subcontractors for the motel, first met with defendant June 7, 1963. Berwick explained he was not examining defendant's tax returns. At the time he was also inquiring into affairs of subcontractors Sam Barlow and Enterprise

[3] The 1961 return was signed by defendant's father.

Steel Erectors. On July 24, 1963, in the presence of his attorney, defendant told Berwick that Enterprise Erectors was a fictitious account, that he was Sam Barlow and that these names were used to get cash to obtain discounts on purchases from Edmier. At subsequent meetings, with his attorney present, defendant made further incriminating statements. Records were then turned over to Berwick. And the attorney told Berwick if an investigation of defendant was begun Berwick should notify him as defendant's attorney. As a result of his examinations Berwick felt there were indications of fraud. On August 8, 1963, Berwick was assigned to a preliminary investigation on defendant.

In March of 1964 Berwick requested of defendant's attorney the records of M. Campione & Son, Inc. for inspection concerning defendant's tax liability. In June, 1964, Berwick wrote the attorney that a case had been opened on defendant and enclosed a subpoena for the Campione Company records. The indictment before us was filed in February, 1967.

After the parties rested at the trial, the district court denied defendant's motion to suppress as evidence the incriminating statements made in 1963 and the records turned over to Berwick, on the ground that defendant's attorney was with him when he made incriminating statements and turned over incriminating records. Defendant contends in this court that the district court ruling erroneously applied the standard of *Escobedo* v. *Illinois*, 378 U.S. 478 (1964). Defendant argues that the basis of his motion was not the literal *Escobedo* rule but that he and an attorney were misled by Berwick's early statement that defendant was not under investigation. The government agrees with defendant that an agent may not

mislead a taxpayer under investigation in order to secure information. See *Smith* v. *United States,* 348 U.S. 147, 150-51 (1954).

It is defendant's theory that at the meetings in the summer of 1963 Berwick misled him and his attorney away from knowledge that his own tax liability was being investigated, thus tainting the incriminating material.[4]

He contends Berwick fraudulently induced the incriminating material by not advising him in the early meetings in June and July, 1963, when the fraud case investigation began, so that he could protect himself against self-incrimination. But the evidence favorable to the government is that before inspecting the Enterprise books after August 2 there was no fraud investigation of defendant under way.

The district court was not required to find that the incriminating statements and records were rendered involuntary and inadmissible. Defendant's theory presupposes that Berwick misled defendant as a matter of law. But the question whether defendant was misled was one of fact.

---

[4] Defendant makes clear that he does not rely upon *Miranda* v. *Arizona,* 384 U.S. 436 (1966), since he was not in custody. But this court in an able opinion, speaking prospectively, by Cummings, J., in *United States* v. *Dickerson,* 7th Cir. Slip Opn. 17349, July 28, 1969, holds that *Miranda* warnings must be given to the taxpayer by an IRS agent at the first contact after the investigation turns to a criminal investigation. See also *United States* v. *Lackey,* 7th Cir. Slip Opn. 17310, July 16, 1969, also written by Cummings, J., deciding that the *Miranda* rules do not require that the defendant have been "in actual custody" before the warnings must be given.

There is evidence favorable to the government that Berwick's receipt of the Enterprise records August 2, in the light of defendant's earlier admissions, indicated fraud to Berwick and resulted in the commencement of the fraud case; that it was not until March of 1964 that he next met with defendant and told him he was interested in defendant's tax liability; that after his earliest meeting with Berwick with respect to the Skar-Sahara affairs defendant obtained false exculpatory affidavits from Edmier employees and that he had his accountants prepare records for Enterprise; and that defendant's attorney, a former IRS attorney-accountant, asked to be notified if an investigation of defendant was begun.

Presumably the district court thought that this evidence showed, not the misleading of an innocent defendant, but rather his anticipation of and preparation for a criminal investigation. Furthermore, the district court presumably believed Berwick's testimony that after the investigation turned upon defendant in August, 1963, he did not again meet with defendant or attorney Harris until March of 1964 and he then told Harris he was interested in defendant's tax liability. This would overcome defendant's theory that before August, 1963, Berwick was covertly investigating defendant's tax liability and using a "subterfuge" to induce incriminating evidence.

We think that the district court was entitled to believe Berwick's testimony of events leading to March, 1964 and accordingly entitled to conclude from that testimony and defendant's activity soon after the first meeting in June, 1963, that Berwick did not by his conduct deprive defendant of his "freedom of action in any significant way." See *Miranda* v. *Arizona*, 384 U.S. 436; *United States* v. *Lackey*, No. 17310. We hold there was no error in denying the motion to suppress.

Defendant contends the district court applied an erroneous standard of proof in finding him guilty. He argues that the court's disbelief of defendant's testimony of how much money was paid Edmier for materials is contrary to the evidence; that it ignored certain evidence and disregarded the mathematics of other evidence and accordingly failed to consider that if defendant paid Edmier more money than the government proved, there could be no unrecorded money chargeable as income to defendant.

He relies upon evidence that Edmier sued him for $122,000 for supplies delivered but for which it was not paid in 1961 and 1962; upon testimony of Edmier's collectors of the cash paid by defendant totaling from $104,000 to $122,000; and upon computations of delivery tickets. The sum of all three, he argues, shows that he paid Edmier's collectors from $114,000 to $150,000. He argues that the government, instead of showing what percentage discounts were given on various materials purchased, arbitrarily applied a 50% factor to all purchases. The effect, he says, was to reduce the amount paid by defendant and correspondingly increase the alleged unreported income. Defendant also complains of the district court's excluding from consideration an amount of $38,149.67 which should have been credited to the year 1962.

We think there is sufficient evidence to sustain the convictions. For the year 1960 the indictment, in Count I, charged defendant personally with evading payment of $8,276. There is evidence to show that of that amount $5,000 and $300 was paid him by checks for work done by Campione Company, and the receipt unreported in the return. There is also evidence of two checks totaling $6,000 for work done by the Company but carried on the books as loans. The $5,300 was charged to defendant

together with $2,976 as his distributable share of the $6,000. For 1960 the records reflected approximately $26,000 in cash disbursements with no originally recorded purpose but with subsequent entries as expenses and the amount deducted in the 1960 tax return. The cash was derived from a Company check for a like amount.

Defendant argues that the $26,000 was used in the cash purchases from Edmier. But the district court did not believe defendant's testimony which was the basis of that argument. The testimony is credible only if the record shows the court should have believed the statements in affidavits of Edmier's employees Russo and Kay as to the cash received from defendant. Russo's affidavit does not stand against proof showing that the amounts he received—in the light of the type material he sold and defendant used—could not have even approximated the amount in defendant's testimony; Kay repudiated the affidavit upon which defendant relies and which Kay testified defendant paid him $5,000 to execute. The court was not required to accept defendant's explanation that the affidavits were based on authentic records, Edmier sales tickets and the like, even though all tickets for all purchases were not in evidence.

Count III[5] charged defendant with evading $77,000 in taxes and failing to report business income for 1962 of $91,000. There is evidence that checks were given defendant for Company work, endorsed by him and not carried in Company books. One, for $6,000, was deposited in a Sam Barlow account; others, for $25,000 and $20,000, were deposited in the Enterprise account; and another check for $28,500 was presented to the First State Bank of

[5] Defendant was found not guilty on Count II.

Worth for collection. The collection "advices" show the proceeds were paid to "Barlow." The same day "Barlow" (defendant) entered his safe deposit box at the bank.

There is also evidence of deductions as business expenses of $25,841 charged to materials on the books of Campione Company. The government established that the Campione Company books failed to reflect income of $73,994, improperly deducted the $25,841 and thus understated income by $99,835. It charged defendant personally with $88,835 of that amount plus the proceeds of the $25,000 and $3,432.40 Enterprise checks. It applied the 50% discount to the cash paid Russo and Kay for materials in computing the tax liability of defendant. Kay testified that the discount on almost all items he sold was 50%, and Russo's collections were insubstantial. The government's use of this figure is accordingly not arbitrary. The government charged defendant with unreported income according to his interest in the Company, "as a constructive dividend or half interest in a partnership arrangement."

A sum of $38,149.87 was carried on the books of Enterprise, was treated by Campione Company in 1962 as cost of goods sold, and was deducted from the 1962 corporate tax return. Defendant claims credit for the sum which was returned to Campione Company in 1963 because although one-half of the sum is charged as income to defendant, the entire sum went back to the Company account. We agree with the government that what occurred in 1963 is irrelevant to what happened in 1962 so far as this case is concerned.

Defendant argues also that since the district court found him not guilty, as to Count II, we should ipso facto find him not guilty under Count IV of willfully understating gross profit. The argument is based on supposition and is unconvincing.

The district court discredited defendant's explanation of the discrepancies in receipts, business expenses and returns, and decided defendant and the Company had income willfully unreported to evade taxes. We cannot say the court erred in that decision. The proof was of substantial evasion and was sufficient for the district court decision, even though less than the amounts charged in the indictment. *United States* v. *Johnson*, 319 U.S. 503 517-18 (1943).

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Wednesday, September 17, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. ROBERT D. MORGAN, *District Judge*

No. 17177

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES CAMPIONE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of this Court filed this day.

APPENDIX C

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Friday, Octber 24, 1969

Before

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

Hon. ROBERT D. MORGAN, *District Judge*

No. 17177

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES CAMPIONE,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the petition of defendant-appellant for a rehearing by the Court en banc in the above entitled appeal, and, no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an en banc rehearing, and the panel having voted to deny a rehearing,

It Is Ordered that the petition of defendant-appellant for a rehearing in the above entitled appeal be, and the same is hereby Denied.

APPENDIX D

In The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typed pages contain a true copy of

The Opinion Dated September 17, 1969.

The Judgment Order Entered September 17, 1969.

The Order Denying Petition For Rehearing Entered October 24, 1969.

Cause No. 17177

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES CAMPIONE,

Defendant-Appellant.

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of October A.D. 1969.

Kenneth J. Carrick
Clerk of the United States Court of Appeals for the Seventh Circuit.
By: *Mary Ann Eban*
Deputy Clerk

(SEAL)